IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO4-1

INQUIRY CONCERNING
A JUDGE, NO. 03-14

RE: JAMES E. HENSON

JUDGE JAMES E. HENSON'S RESPONSE TO ORDER TO SHOW CAUSE

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STATEMENT OF CASE AND FACTS

On July 9, 2003, an Investigative Panel of the Judicial Qualifications Commission ("JQC") served a Notice of Investigation on Judge James E. Henson ("Judge Henson"). The Notice contained 9 separate allegations of misconduct. In the notice, the JQC offered Judge Henson the opportunity to provide a written response to the allegations and invited him to appear before the Investigative Panel. On October 1, 2003, Judge Henson provided the JQC with a written response to the allegations of misconduct. On October 10, 2003, Judge Henson appeared and provided sworn testimony at a hearing conducted by the Investigative Panel pursuant to JQC Rule 6(b). In both his written response and at the hearing, Judge Henson admitted that he accepted a retainer fee and agreed to represent Diana Jimenez ("Diana") while he was still serving his term as a county court judge.[1] (Exh. 9, 10).[2]

On January 6, 2004, the JQC served a Notice of Formal Charges upon Judge Henson, which included two counts of alleged misconduct. Count One alleged that Judge Henson engaged in misconduct while he was a county court judge and Count Two alleged that Judge Henson

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[1] This incident of misconduct comprised Count One of the Amended Notice of Formal Charges filed by the JQC. Judge Henson's admission on this issue was included in the Factual Stipulations entered into by the JQC and Judge Henson. (Exh. 18).

[2] Exh. refers to the Exhibits submitted to the Court by the Hearing Panel. (*See* Hearing Panel's Notice of Filing Exhibits).

engaged in misconduct while he was a practicing attorney.[3] In his Answer to to the Notice of Formal Charges, Judge Henson admitted again that he accepted a retainer fee and agreed to represent Diana Jimenez while he was still serving his term as a county court judge. Judge Henson denied the substance of all the other allegations of misconduct.

On August 25, 2004, the JQC filed an Amended Notice of Formal Charges in which it deleted the allegations contained in paragraphs 9 and 10 of Count Two. The Amended Notice contained two counts of misconduct which were alleged in 8 paragraphs. The JQC subsequently abandoned several of the allegations contained in Count Two, Paragraph 8, of the Amended Notice. (Order on Pre-Hearing Conference).

Judge Henson filed a Motion to Dismiss Count One of the Amended Notice (misconduct while a county judge), arguing that the JQC lacked subject-matter jurisdiction over the misconduct Judge Henson allegedly committed while he served as a county court judge. The Chair of the Hearing Panel denied Judge Henson's Motion, concluding that the JQC had personal jurisdiction over Judge Henson

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[3] As indicated in the Factual Stipulations and the Findings, Conclusions and Recommendations of the JQC Hearing Panel, Judge Henson served as a County Court Judge for Orange County, Florida, from January 1996 to January 5, 2001. Judge Henson was subsequently elected a Circuit Court Judge for the Ninth Judicial Circuit, in Orange County, Florida, and has served in that position since January 2003. In the period between his two judicial terms, Judge Henson practiced criminal defense law. (Exh. 18).

because he had become a circuit court judge. (Order on Pre-Hearing Conference; T1 at 4-5; PT1 at 5-7))[4]. This case proceeded to hearing on October 12, 2004. The allegations of misconduct which were the subject of the hearing were as follows:

> **COUNT ONE - MISCONDUCT WHILE A JUDGE**
>
> 1. In late 2000, while you were a county judge, you asked Rogelio Candelaria, a bail bondsman, to arrange a meeting between you and Dr. Alberto Jimenez, whose daughter Diana M. Jimenez, was facing a charge of DUI manslaughter.
>
> 2. On or about December 18, 2000, while you were a county judge, you met with Dr. Jimenez, who had previously retained Steve Jablon, Esq. to represent Diana Jimenez. The purpose of the meeting was for you to be retained in place of Mr. Jablon. At the meeting, you persuaded Dr. Jimenez to discharge Mr. Jablon and to retain you.
>
> 3. At the meeting with Dr. Jimenez, on or about December 18, 2000, in Mr. Candelaria's office, and while you were a county judge, you accepted a fee of $15,000 from Dr. Jimenez for the representation of his daughter.
>
> 4. On or about December 20, 2000, while you were a county judge, you were present in the courtroom at a hearing to set bond for Ms. Jimenez.

[4] (T1 at 4 = Volume 1, Page 4 of the Hearing Panel Transcript; PT1 at 10 = Page 10 of the Transcript of the Pretrial Conference Conducted on September 17, 2004; PT2 at 10 = Page 10 of the Transcript of the Pretrial Conference Conducted on September 30, 2004)

COUNT TWO - MISCONDUCT WHILE A LAWYER

A. Advice to Clients to Leave Jurisdiction

5. You represented Diane M. Jimenez, who was arrested on December 12, 2000 for DUI manslaughter and other related charges. In or about September or October 2001, while Ms. Jiminez was released from jail on a $100,000 bond, you met with her and her father and discussed the possibility of Ms. Jimenez fleeing to Colombia, and you advised her to do so.

6. You represented Jerry Lee Thompson, who was arrested on April 29, 2001 for (I) unlawfully carrying a concealed handgun; (ii) unlawfully possessing 10 grams or less of marijuana; and (iii) using or possessing drug paraphernalia. In or about the summer and fall of 2001, while Mr. Thompson was released from jail on a $25,000 bond, you advised him to flee to Mexico to avoid the charges he faced.

7. You represented Hector Rodriguez, Jr., who was arrested on March 14, 2001 for sexual battery charges. In or about January, 2002, while Mr. Rodriguez was released from jail on a $75,000 bond, you advised him to flee the jurisdiction, which he did.

B. Inadequate Representation of Client

8. In the course of representing Ms. Jimenez, you failed to communicate the State's settlement offer to Ms. Jimenez of 10 or 12 years imprisonment, which was less than the 16 years to which she was later sentenced.

(Amended Notice of Formal Charges).

The JQC and Judge Henson entered into Factual Stipulations prior to the commencement of the hearing. (Exh. 18) Those Factual Stipulations are laid out in full detail in the Hearing Panel's

Findings, Conclusions and Recommendations. (JQC Findings at 6-8).

At the hearing, the testimony of Diana Jimenez was provided by video deposition. Diana testified that her father, Dr. Alberto Jimenez, hired Judge Henson to represent her on DUI manslaughter and other charges arising out of an automobile accident in which she was involved in December of 2000. Diana, along with her mother, Maria Jimenez, and her father, Dr. Jimenez, attended a subsequent meeting with Judge Henson in August 2001. Diana testified that, during that meeting, Judge Henson mentioned Colombia, asked her about her family there, and indicated that Colombia has no extradition treaty with the United States. (T1 at 36, 43-47).

On cross-examination, Diana conceded that Judge Henson never advised her to flee the jurisdiction. Likewise, she conceded that the option of fleeing was never discussed by Judge Henson. Finally, Diana testified that Judge Henson never discussed the manner in which she should leave, the geographical route she should take in order to flee, or the cost of leaving. (T1 at 59-60, 67, 72, 76-78).

Diana also testified that she and her father waited ten months before they filed a complaint with the Florida Bar against Judge Henson. (T1 at 65). She indicated that she first came to believe that fleeing the jurisdiction was an option after she bonded out. She stated that the questions and arguments made at the bond

hearing which related to her being a flight risk gave her that idea. (T1 at 70-71).

Diana again testified that Judge Henson never specifically told her to flee the jurisdiction. (T1 at 72, 77). She indicated, however, that based on the statements he was making to her, she "believed" that he was "trying to put the idea in her head." (T1 at 72-79). Ms. Jimenez testified, however, that she did not come to this belief until she "reflected back on all of this." (T1 at 72).

The deposition testimony of Diana Jimenez' mother, Maria Jimenez, was read into the record. Judge Henson objected to the introduction of Maria's deposition, arguing that it was inadmissible hearsay. Judge Henson's objection was overruled by the Chairman of the Hearing Panel. Maria testified that she is not fluent in English and only understands some words. Maria testified that she heard Judge Henson say "Columbia" during the August 2001 meeting at his office. She also testified that she heard the word "extradition" during the conversation. (T1 at 81-88).

Attorney Robert Nesmith also testified at the hearing in this case. Mr. Nesmith testified that, in December 2000, Judge Henson asked him to do the bond hearing in Diana Jimenez' case. He further indicated that he began sharing office space with Judge Henson in January 2001. (T1 at 105-109).

Mr. Nesmith testified that, during a conversation in their office, Judge Henson told him that he had told Diana and Dr. Jimenez that Diana should leave and go to Colombia. Mr. Nesmith also said that Judge Henson told him he would deny making this statement if Mr. Nesmith ever repeated it. (T1 at 112-113, 169).

Over Judge Henson's strenuous objection, Mr. Nesmith testified that, at some subsequent time, Judge Henson attempted to refer Mr. Nesmith a drug-trafficking case. At that time, Mr. Nesmith testified that Judge Henson told him, "Well, you know I'm trying to buy your silence, don't you?" Judge Henson argued that the "buy your silence" testimony was irrelevant because it was remote in time and could not be tied to the Diana Jimenez case (T1 at 114-122).

On cross-examination, Mr. Nesmith testified that he was unsure of the date when he claims Judge Henson said that he had told Diana Jimenez to flee the jurisdiction. Mr. Nesmith indicated only that the conversation occurred between July and September 2001. Mr. Nesmith agreed that, in his deposition, he had indicated that the conversation occurred four or five months before Diana Jimenez entered her plea on October 18, 2001. He also expressed significant confusion about whether the conversation occurred before or after he went on vacation in the Bahamas. (T1 at 123-128).

Mr. Nesmith testified that he initially expected to split the

fee in the Diana Jimenez case with Judge Henson, but that he was never paid any portion of the fee by Judge Henson. He also testified that he expected Judge Henson to move into another office building with him and help him make the lease payments on the building, but that Judge Henson backed out of their agreement, leaving him to pay the entire rent. He conceded that he was upset with Judge Henson's decision not to rent the office and help him with the lease payments. (T1 at 128-33, 174).

Mr. Nesmith also testified that Mr. Henson's alleged attempt to "buy his silence" would not have been legal or ethical. Mr. Nesmith was unsure of when Mr. Henson made this alleged statement. He could not place the statement in 2001 or 2002. Mr. Nesmith conceded that he knew that it was both illegal and unethical for Judge Henson to advise Diana Jimenez to flee the jurisdiction. Despite his claim that Judge Henson told him he had provided such advice and had offered to "buy his silence," Mr. Nesmith testified that he did not contact law enforcement or notify the Florida Bar. Mr. Nesmith indicated that he (Nesmith) had been the subject of a Florida Bar grievance on a number of occasions, and had actually received a 30-day suspension and a public reprimand from the Florida Bar. (T1 at 134-36).

Mr. Nesmith acknowledged that he had provided a statement to the State Attorney's Office regarding the allegations against Judge Henson on February 13, 2003. When he made that statement, Mr.

Nesmith did not mention to the Assistant State Attorney that Judge Henson had tried to "buy his silence" by attempting to refer him a drug case, nor did he tell the Assistant State Attorney that Judge Henson had told him he would later deny that he had advised Diana to flee the jurisdiction. (T1 at 136-42; Exh. 6).

Later in his testimony, Mr. Nesmith repeatedly stated that he believed that Judge Henson may have been joking when he allegedly said he was trying to buy Nesmith's silence. He testified that he did not take Judge Henson's alleged comments seriously. (T1 at 155-56, 158-59). Additionally, Mr. Nesmith testified that he could not be sure that Judge Henson was referring to the Diana Jimenez situation when he made the alleged comments.[5] (T1 at 175-76, 185).

With the consent of the parties, the transcript of Mr. Nesmith's statement to the State Attorney's Office was admitted into evidence. (T1 at 183). Mr. Nesmith testified that his involvement in the case may have been brought to the attention of the State Attorney's Office by Mark Bender, Judge Henson's political opponent in the 2002 election for circuit judge. Mr. Nesmith indicated that he had initially told Judge Henson that he would assist him with his campaign, but later changed his mind once he found out that Henson and Bender were running against each

[5] Mr. Nesmith's testimony in this regard was directly contrary to the testimony he had provided to the Chairman of the Hearing Panel during a proffer. At that time, Mr. Nesmith testified that the Diana Jimenez case was the only thing to which Judge Henson could have been referring. (T1 at 120-21).

other. (T1 at 187-89). Mr. Nesmith was unsure whether he had agreed to assist Judge Henson with his campaign before or after Judge Henson allegedly told him he had advised Diana Jimenez to flee and offered to "buy his silence." (T1 at 192).

The testimony of Dr. Alberto Jimenez, Diana Jimenez' father, was presented to the Hearing Panel through video deposition. Dr. Jimenez testified that he hired Judge Henson to represent his daughter in December 2000. Dr. Jimenez testified that Judge Henson called him by telephone at Dr. Jimenez' office and informed him about a 16-year plea offer in Diana's case. When Dr. Jimenez expressed displeasure with that offer, he testified that Judge Henson told him that "we can put your daughter on a plane to Puerto Rico and from Puerto Rico to Colombia." Dr. Jimenez also indicated, however, that he told Judge Henson that there was no extradition treaty between Colombia and the United States. Dr. Jimenez stated that Judge Henson told him that there **was** an extradition treaty between the two countries. (T2 at 278-79). Dr. Jimenez further testified that his wife had told him that Judge Henson, at an office meeting in August 2001, had previously indicated that there **was** an extradition treaty between Colombia and the United States. (T2 at 281-83).

On cross-examination, Dr. Jimenez testified that the alleged telephone call to his office was the only time at which he ever discussed Diana going to Colombia with Judge Henson. He never

mentioned this conversation to anyone until Rojelio Candelaria, the bail bondsman that worked on Diana's case, told him about other clients of Judge Henson who had allegedly fled the jurisdiction. Dr. Jimenez' conversation with Candelaria took place months after the alleged advice to flee. Dr. Jimenez testified that he did not hear Judge Henson advise Diana to flee the jurisdiction at the August 2001 meeting. (T2 at 293-98).

Dr. Jimenez testified, however, that the Colombia option was only discussed after he asked if there were any options other than the acceptance of the 16-year plea offer. He testified that no other details of that option were ever discussed. (T2 at 299-301).

Dr. Jimenez testified that he was contacted by Rojelio Candelaria and Mark Bender by telephone in October 2002, during Judge Henson's campaign for circuit court judge. He testified that both Candelaria and Bender suggested that filing a bar complaint against Judge Henson would be appropriate. (T2 at 302-07).

At the beginning of Judge Henson's case, the Hearing Panel took judicial notice of Rules 4-1.2 and 4-8.3 of the Rules Regulating the Florida Bar. Rule 4-1.2(d) provides that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law." Rule 4-8.3(a) provides that "[a] lawyer having knowledge that another lawyer has committed a violation of

the Rules of Professional Conduct that raises a substantial question at to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority." (T3 at 333-34).

Judge James Henson provided testimony before the Hearing Panel. As indicated in the Hearing Panel's Findings, Conclusions and Recommendations, Judge Henson was elected to the position of county court judge in Orange County in 1995. He served the term of that position which ended on January 5, 2001. Judge Henson ran for re-election during 2000 but was defeated. He returned to the practice of law doing criminal defense work and again ran for a new judicial post as a circuit judge in the 2002 election. He was elected to the position of circuit court judge effective January 5, 2003. Since that time, he has been assigned to the juvenile division in Orange County, handling dependency matters.

In the 2002 election, Judge Henson defeated Attorney Mark Bender. Mark Bender made the allegations which are the subject of this proceeding a feature of that campaign. (T3 at 366-67).

Judge Henson provided the Hearing Panel with background information and his employment history. He testified that he served three years in the Army and received an honorable discharge. He graduated law school in 1985 and was admitted to the Florida Bar in 1986. He worked as a Public Defender in Orange County, Florida, for two years. Judge Henson then left the Public Defender's Office

and went into private practice in Orlando. He remained in private practice from 1988 until he was elected a county judge in 1996. Judge Henson served four years as a county court judge in the criminal traffic division. In 2000, he sought reelection but was defeated. (T3 at 335-42).

Judge Henson was defeated in his attempt at reelection on November 4, 2000. At that time, Judge Henson attempted to restart a private practice in criminal law. As of December 15, 2000, he had cleared out his office and had taken vacation time for the rest of the year. He had been given a farewell party by court personnel and no longer conducted any judicial duties or went to the courthouse in his capacity as a judge. (T3 at 342-43, 347).

As he has throughout these proceedings, Judge Henson admitted that he wrongfully agreed to represent Diana Jimenez prior to the end of his term as a county court judge. (R3 at 345, 351, 374-75, 377, 410-414, 415). He testified that he set up a meeting with Rojelio Candelaria for December 20, 2000, to discuss him providing representation to Diana Jimenez. Judge Henson realized that he was still a judge at that time, but didn’t really think of it in those terms because he had ceased performing all of his judicial duties and had physically moved out of his judicial chambers at the courthouse. He testified that he agreed to represent Ms. Jimenez and accepted a retainer fee on December 20. He told Diana and Dr. Jimenez that he was still a judge and could not work on the case

until his term officially ended. Judge Henson testified that he mistakenly believed his term ended on December 31, 2000. In fact, his term did not actually end until January 5, 2001. Judge Henson deposited the Jimenez check for his retainer on January 2, 2001, because he believed that he was no longer a judge and could start practicing law again. Judge Henson filed his Notice of Appearance on January 5, 2001, for the same reason. Judge Henson testified that he was not involved in Diana Jimenez's bond hearing on December 22, 2000, but was merely a spectator. (R3 at 345-351, 367).

Judge Henson repeatedly denied that he **ever** advised Diana Jimenez to flee the country to avoid prosecution. (R3 at 345, 352, 388, 389, 435). He testified that he **never** had a discussion with Diana about fleeing the jurisdiction. (R3 at 345, 352, 388, 389). Judge Henson testified, however, that he did discuss the issue with Dr. Jimenez, Diana's father. Judge Henson indicated that this discussion about fleeing was initiated by Dr. Jimenez after he informed the doctor of the 16-year plea offer from the State. Judge Henson testified that he strongly recommended that Diana not flee the jurisdiction. (R3 at 352-53).

On cross-examination, Judge Henson acknowledged that he was aware that the Judicial Canons prohibited him from practicing law while he was still a judge. He also conceded that he was aware that there were no exceptions when the judge expects to leave

office at some time in the future. (T3 at 367-68).

Judge Henson, however, explicitly denied ever talking to Dr. Jimenez about Diana getting on a boat to the Caribbean and then going to Colombia. (T3 at 392-93). Judge Henson acknowledged that he had a discussion with Robert Nesmith about Diana Jimenez potentially fleeing the jurisdiction. He testified, however, that he merely informed Mr. Nesmith that Dr. Jimenez had indicated a desire to tell Diana to flee the jurisdiction. (T3 at 394-97).

On redirect, Judge Henson reiterated that he had never told, implied, or suggested to Mr. Nesmith that he had advised Diana or Dr. Jimenez that Diana should flee the jurisdiction. Judge Henson indicated that there was some animosity between himself and Mr. Nesmith, because Mr. Nesmith had taken some clients away from him and there had been some disagreement about sharing an office building. (T3 at 398-402).

Upon questioning by members of the Hearing Panel, Judge Henson again specifically denied telling Mr. Nesmith he had advised Diana Jimenez to flee and that he would deny doing so if it ever came out. He further denied that he had ever told Mr. Nesmith that he was trying to "buy his silence." (T3 at 404, 415). Finally, Judge Henson testified that he emphasized to Dr. Jimenez that Diana should not flee the jurisdiction in order to avoid prosecution. (T3 at 456).

Attorney Donald Henderson provided testimony in support of

Judge Henson.[6] Attorney Henderson testified that he has been a lawyer for 14 years. He indicated that he met Judge Henson in 1989 while Attorney Henderson was working at the Public Defender's Office in Orlando. Attorney Henderson and Judge Henson became friendly because they are both veterans and both pursued law as a second career. Attorney Henderson testified that Judge Henson is a truthful person. He further testified that "[n]ever has there been any incidents where I though he might have said something or indicated that he had done something in the past that would indicate that he was not a truthful person." (T3 at 458-462, 469).

Attorney Joseph Peyton Lea also provided testimony in support of Judge Henson. Attorney Lea testified that he has been a lawyer since 1978 and practices criminal law. He testified first met Judge Henson while Judge Henson was working at the Public Defender's office and that he had shared office space with Judge Henson in private practice from 1987 until 1995 or 1996. Attorney Lea indicated that he and Judge Henson were actually law partners for two or three years. Attorney Lea testified that Judge Henson was different from all the other public defenders, because he took an avid interest in each one of his cases, never backed down, and always fought for his client. Attorney Lea testified that Judge

[6] Judge Henson only presented the live testimony of three character witnesses because he had been specifically limited to that number by the Hearing Panel. (*See* Order Scheduling Hearing and Prehearing Conference, July 23, 2004).

Henson has a reputation in the community as being truthful. He testified that Judge Henson is "as honest as the day is long." (T3 at 472-77).

Upon questioning by members of the Hearing Panel, Attorney Lea again testified that Judge Henson is honest, and stated that he would trust Judge Henson with his life. (T3 at 482-83).

Circuit Court Judge Jose Rodriguez also provided testimony on behalf of Judge Henson. Judge Rodriguez testified that he has been a circuit court judge since 1993 and has been the administrative judge in the juvenile division for the previous two years. Judge Rodriguez testified that Judge Henson has been one of the judges in his division for the two years in which he has been the administrative judge. He testified that he has known Judge Henson for a significant period of time and that Judge Henson has a reputation for being honest. Additionally, Judge Rodriguez testified that, for the past two years, Judge Henson has performed his work effectively and efficiently, and regularly asks if he can provide help to others. Judge Rodriguez indicated that he has not received any letters or complaints about Judge Henson's performance as a circuit court judge. (T3 at 488-98).

Finally, Judge Henson submitted numerous letters from various members of the community. (Exh. 24). Kathleen Gordon, a member of the Orange County School Board, described Judge Henson as follows:

> We believe that in our community that he is the kind of judge who respects community

> without color or person stationed in life. I have personally observed him while on the bench and have been impressed with his even handed objective and compassionate approach to the those in his court room.
>
> He appeared involved with each person that appeared before him. He was truthful in his deliberation and appeared to win the respect of those in the court room. I feel that Judge Henson is truthful and can be trusted to tell the truth. Our community is blessed to have a person of his character serving us on the bench.

(Exh. 24).

Attorney Nickole Frederick provided the following description of Judge Henson:

> I have found Judge Henson to be knowledgeable of the law and fair and impartial in the application of the law. James Henson may not be a perfect man, but as a judge he has shown himself to be a man of integrity and character. I will, from my personal experience, attest that Judge Henson is a truthful and honest judge who is worthy of his calling to this high position in the community.

(Exh. 24).

The remaining letters in support of Judge Henson described him as “fair,” “impartial,” “compassionate,” “straight forward,” and “respectable.” (Exh. 24).

On January 18, 2005, the Hearing Panel of the JQC issued its Findings, Conclusions and Recommendations. The JQC found Judge Henson guilty on Count One (practicing law while a judge), which he had admitted, and guilty of Count Two, Subsection A, Paragraph 5

(advising Diana Jimenez to flee), but found him not guilty on all of the remaining allegations. Two members of the six-member Hearing Panel Dissented from the finding of guilt on Count Two.[7]

The Hearing Panel has recommended to this Court that Judge Henson be found guilty and that he be removed from office as a circuit court judge. The Hearing Panel concluded that Judge Henson's actions were inconsistent with the responsibilities of a judicial officer and that Judge Henson is presently unfit to hold judicial office. The Hearing Panel specifically concluded that Judge Henson had been untruthful in his testimony before the panel. (JQC Findings at 11-12).

The Hearing Panel noted that Judge Henson had admitted his guilt on Count One. Based on Judge Henson's admission and the evidence presented, the Panel concluded that Judge Henson, by accepting the Jimenez case, had engaged in the practice of law while he was still a county court judge. (JQC Findings at 16-18).

Without further explanation, the Hearing Panel further concluded that, in light of its finding of guilt on Count Two, the misconduct involved in Count One was part of a "pattern of misconduct." The Hearing Panel conceded, however, that a finding of guilt on Count One alone might only warrant the sanction of

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[7] Pursuant to Article V, Section 12, of the Florida Constitution, 12(b), and Rule 19 of the Florida Judicial Qualifications Rules, a two-thirds vote of the Hearing Panel is the **minimum** number of votes necessary to support a recommendation that a judge be removed from office.

public reprimand. (JQC Findings at 18).

On Count Two, the Hearing Panel noted that the testimony on the issue of whether Judge Henson advised Diana Jimenez to avoid prosecution by fleeing to Columbia was in dispute. The Hearing Panel rejected the testimony of Judge Henson on this issue. The Panel found the testimony of Diana Jimenez, Dr. Jimenez, and Robert Nesmith to credible and concluded that their testimony was clear and convincing. (JQC Findings at 18-19).

Despite the fact that the Hearing Panel found Judge Henson not guilty on the charge of failing to convey the State's 12-year plea offer to Diana Jimenez, the Panel cited evidence on this issue as a basis for its ruling. (JQC Findings at 20-21). Likewise, despite the fact that the Hearing Panel found Judge Henson not guilty of the charges of advising Jerry Lee Thompson and Hector Rodriguez to flee the jurisdiction, the Panel cited the fact that Bail Bondsman Rojelio Candelaria was involved in all those cases, as well as the Diana Jimenez case, as evidence to support its finding of guilt on Count Two. The Panel explicitly noted that it was "troubled by his (Candelaria) presence in regard to all three of these matters." (JQC Findings at 24-25).

Finally, despite the fact that the JQC had abandoned the charge that Judge Henson had failed to properly prepare for a trial in Diana Jimenez' case, the Panel concluded that "Judge Henson was not actually prepared to go to trial in the Jimenez case." The

Panel concluded that he had not taken depositions or done discovery and had not adequately prepared the case through motion practice. Thus, the Hearing Panel concluded that "Judge Henson was not ready to proceed with a trial and this was a factor which motivated him to suggest to his client that the option of flight was available." (JQC Findings at 26).

The Hearing Panel noted that there was conflicting testimony as to whether Judge Henson used the word "Columbia" during the August 2001 meeting at his office. The Panel acknowledged that Judge Henson denied using the word, but that other witnesses, including Maria Jimenez, testified that he brought up both the subject of Columbia and extradition at that meeting.

The Hearing Panel noted that Dr. Jimenez waited an extended period of time before he filed a complaint with the Florida Bar against Judge Henson. The Hearing Panel also noted that Judge Henson's alleged comments about buying Mr. Nesmith's silence had not been specifically related to the Diana Jimenez case or the issue of fleeing the jurisdiction involved in this case. Likewise, the Panel found that, at the time the comments were allegedly made, Mr. Nesmith did not take the comments seriously and thought that Judge Henson was joking. (JQC Findings at 22-23).

The Hearing Panel, by exactly a two-thirds vote, recommended that this Court adopt the Panel's findings and order that Judge Henson be removed from office. (JQC Findings at 25, 27).

On January 24, 2005, this Court issued an Order instructing Judge Henson to show cause by February 14, 2005, why the action recommended by the JQC should not be granted. On February 9, 2005, Judge Henson filed a Motion for Extension of Time to Response to this Court's Order to Show Cause. This Court granted Judge Henson's motion and ordered that he file his response by March 7, 2005.

SUMMARY OF ARGUMENT

Judge Henson was found guilty of two counts of misconduct by a Hearing Panel of the JQC. He was acquitted of all other charges. The Hearing Panel has recommended the ultimate sanction of removal.

First, Judge Henson was found guilty for improperly engaging in the practice of law while he was still a judge by accepting a private case at the end of his term as a county judge, after he had moved out of his judicial office, and after he had wrapped up his judicial duties. From the outset of the JQC's investigation, Judge Henson has admitted this conduct, and has admitted that it was wrong. The Hearing Panel noted that this conduct, standing alone, "might well have merited only a reprimand."

The precise allegation of misconduct in Count Two was that Judge Henson "met with her (Diana Jiminez) and her father and discussed the possibility of her fleeing to Colombia, **and you advised her (Diana) to do so.**" By the closest of votes (4 to 2), the Hearing Panel found Judge Henson guilty of this allegation.

This finding was based on the conflicting, inconsistent, and significantly impeached testimony of 4 witnesses - Diana, who said Judge Henson never advised her to flee; Dr. Jimenez, Diana's father, who claims that in one phone conversation, to which Diana was not a party, Judge Henson said "we could put her on a plane to Puerto Rico and then to Colombia;" Diana's mother, who doesn't speak or understand English, who said she heard the word "Colombia"

mentioned during a meeting in Judge Henson's office; and finally, testimony by Attorney Robert Nesmith who said that, at some unspecified time, Judge Henson told him he had advised Diana to flee.

The testimony of these four witnesses was indecisive, confused, contradictory, and lacking in credibility, and thus, failed to support the Hearing Panel's conclusion that Judge Henson's guilt had been established by clear and convincing evidence.

Additionally, the Hearing Panel improperly relied on (1) conduct for which Judge Henson was acquitted; (2) uncharged misconduct; and (3) inadmissible hearsay to support its finding of guilt and its recommendation that Judge Henson be removed from office. The Hearing Panel, however, failed to give any consideration to the wealth of evidence concerning Judge Henson's good character and good service as a county and circuit court judge.

Since the JQC actually failed to establish Count Two by clear and convincing evidence, there was no "pattern of misconduct," and Judge Henson should only be subject to sanction for the misconduct contained in Count One. The most appropriate sanction for the misconduct that Judge Henson has admitted from the outset of the JQC's investigation is a public reprimand.

ARGUMENT

Under the Florida Constitution, a Hearing Panel of the JQC is vested with the authority to receive and hear formal charges brought against a judge. If at least two-thirds of the six-member panel (four members) are in agreement, the Hearing Panel may recommend to this Court that a judge or justice be removed from office. Upon a simple majority vote of the panel, the Hearing Panel may recommend to this Court that a judge or justice be subject to another form of appropriate discipline (reprimand, fine, suspension). Article V, Sections 12(a),(b), FLA CONST.

At all times in these proceedings, the burden of proof is on the JQC to prove its allegations by clear and convincing evidence. At no time does this burden shift to the accused judge.

This Court shall receive recommendations from the Hearing Panel, but may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the JQC. This Court "may order that the justice or judge be subjected to appropriate discipline, or be removed from office with termination of compensation for willful or persistent failure to perform judicial duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office . . ." Article V, Section 12(c)(1).

I. THE HEARING PANEL'S FINDING OF GUILT ON COUNT TWO (ADVISING DIANA JIMENEZ TO FLEE) WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The JQC failed to establish Judge Henson's guilt on Count Two by clear and convincing evidence. The evidence presented by the JQC was not credible, clear, distinct, or precise, and thus failed to support a conclusion that Judge Henson advised Diana Jimenez to flee the jurisdiction in order to avoid prosecution.

"Because of the serious consequences attendant to a recommendation of reprimand or removal of a judge, the quantum of proof necessary to support such a recommendation "must be 'clear and convincing.' There must be more than a 'preponderance of the evidence,' but the proof need not be 'beyond and to the exclusion of a reasonable doubt.'" *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994); *In re LaMotte*, 341 So. 2d 513, 516 (Fla. 1977).

In order to meet this burden of proof, the JQC was required to present the Hearing Panel with the following:

> Evidence that was **credible**
>
> Testimony from witnesses whose recollections were **clear and without confusion**
>
> Testimony based upon **distinct memories** of the witnesses; and
>
> Testimony that was **precise and explicit**.

Davey, 645 So. 2d at 404; *Department of Children and Families v. F.L.*, 880 So. 2d 602, 614 n.7 (Fla. 2004) (citing definition of "clear of convincing" found in *Davey* with approval).

In order to be clear and convincing, "the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *Id*. "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Id*.; *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983) ("clear and convincing evidence" must establish abiding conviction that evidence is true).

This Court is required to study the record and independently assess the factual findings, conclusions, and recommendations of the JQC. The findings and conclusions of the JQC are only entitled to great weight if they have been established by clear and convincing evidence. The ultimate power and responsibility in making a determination rests with this Court. *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997).

In *Davey*, the JQC charged a sitting judge with various incidents of misconduct he allegedly committed while practicing law prior to being elected to judicial office. The charged misconduct allegedly occurred after the judge informed the other members of his law firm that he intended to run for a vacant seat as a circuit court judge and began efforts to separate from the law firm.

One of the allegations against Judge Davey was that, after he had left the firm, he attempted to convert a settlement fee earned by the firm entirely to himself. The JQC hearing panel found that

the judge's attempt to convert the fee to himself had only been thwarted by the fact that the settlement check had been made payable to the firm instead of directly to the judge. The hearing panel concluded, therefore, that the evidence presented at the hearing established the allegation against the judge by clear and convincing evidence. In light of that conclusion, and the conclusion that the judge had committed another similar act of misconduct, the hearing panel recommended that the judge be removed from office. *Davey*, 645 So. 2d at 399-403.

This Court disregarded the JQC's recommendation, concluding that the JQC failed to establish that the judge committed the alleged misconduct by clear and convincing evidence. This Court concluded that the JQC's finding that the judge's efforts were thwarted because the settlement check had been made payable to the firm was not supported by the record. In reaching its conclusion, the Hearing Panel had relied primarily on the testimony of Cooper and Douglas, two of the judge's former partners at the firm. This Court noted, however, that at the hearing, Cooper had provided contradictory testimony about whether he remembers seeing the settlement check. This Court also noted that Douglas had no specific recollection about whether he had ever seen either the actual check or a copy. *Id*. at 404-05

This Court concluded that the testimony before the JQC on that point was "**indecisive, confused, and contradictory –- a far cry**

from the level of proof required to establish a fact by clear and convincing evidence." *Id*. at 405 (emphasis added). Since the record failed to support the JQC's key finding that the settlement check was made payable to the firm rather than the judge, this Court concluded that the JQC's ultimate finding of guilt was not supported by clear and convincing evidence. Accordingly, this Court rejected the JQC's findings on this charge. Based on that rejection and other mitigating evidence, this Court also rejected the JQC's recommended sanction of removal and concluded that the judge should only be subjected to a public reprimand. *Id*. at 405-10.

In the instant case, the Hearing Panel relied primarily on the testimony of Diana Jimenez, Dr. Jimenez, Maria Jimenez, and Robert Nesmith, to support its finding of guilt on Count Two. Like the testimony of Cooper and Douglas in *Davey*, the testimony of these four witnesses was unclear, indecisive, confused, and contradictory, and thus, failed to establish the guilt of Judge Henson by clear and convincing evidence.

The testimony of the various witnesses presented by th JQC in support of Count Two was anything but credible, clear and without confusion, based on distinct memories, and precise. The charge was that Judge Henson advised Diana to flee. Diana testified that Judge Henson never advised her to flee. Dr. Jimenez testified that in one telephone conversation, which Diana was not a party to,

Judge Henson said “we could put her on a plane to Puerto Rico, and then to Colombia.” Mr. Nesmith claimed that, at some unspecified time, Judge Henson told Nesmith that he had advised Diana to flee.

Diana Jimenez

Diana Jimenez is a disgruntled, former client of Judge Henson who is a convicted felon serving a 16-year prison sentence for killing two innocent people in a DUI crash, and then leaving the scene. A witness with a felony conviction should not be considered credible.

Diana Jimenez repeatedly indicated that Judge Henson never told her to flee the jurisdiction. In fact, she testified that Judge Henson never even discussed the topic of fleeing with her. Diana’s testimony in this regard was consistent with the testimony of Judge Henson, who repeatedly denied that he ever advised Diana to flee the jurisdiction or discussed the issue with her at any time.

Diana testified that she came to “believe” that Judge Henson was trying to put the idea of fleeing in her head only after she reflected back on everything that happened and everything Judge Henson said, after she had been sentenced and was serving her prison term. Diana conceded, however, that the practical option of fleeing the jurisdiction originally came to her mind when she heard the questions and arguments raised at her bond hearing, not through any words or actions taken by Judge Henson.

Although Diana did testify that, at the August 2001 meeting, Judge Henson told her that there was no extradition treaty between Columbia and the United States, that testimony was subsequently contradicted by the testimony of her father, Dr. Jimenez. Dr. Jimenez testified that his wife, Maria Hernandez, told him that Judge Henson had told her at the August 2001 meeting that there **was** an extradition treaty between the two countries.

Likewise, Dr. Jimenez also testified that Judge Henson had told him that there **was** an extradition treaty between the two countries when Judge Henson called Dr. Jimenez on the telephone to discuss the State's 16-year plea offer. The testimony of Dr. Jimenez in this regard was consistent with the testimony of Judge Henson. Judge Henson acknowledged that he discussed the issue of Diana fleeing the jurisdiction with Dr. Jimenez during that telephone call, but indicated that he strongly counseled against Diana taking that course of action after the issue was raised by Dr. Jimenez.

Therefore, Diana Jimenez' testimony on the subject of Judge Henson advising her to flee the jurisdiction was not credible, clear, distinct, or precise, and provided no support for the Hearing Panel's conclusion that Count Two was established by clear and convincing evidence.

Robert Nesmith

Robert Nesmith was a lawyer who had personal and professional

differences with Judge Henson regarding financial matters on at least two occasions. He had been the subject of multiple bar grievance proceedings, and had been suspended from the practice of law at least once.

Robert Nesmith's testimony also provided little support for the Hearing Panel's finding of guilt on Count Two. Although Mr. Nesmith testified that Judge Henson told him that he had told Diana and Dr. Jimenez that Diana should leave and go to Columbia, Mr. Nesmith was completely unclear as to when this alleged conversation took place.

Mr. Nesmith also testified that Judge Henson subsequently tried to refer him a drug case, and told him that he was trying to buy his silence.[8] Mr. Nesmith was extremely confused about the timing of this alleged conversation. Mr. Nesmith's complete inability to recall the timing of these two extremely important, memorable, and allegedly incriminating statements by Judge Henson calls his credibility into serious question.

Additionally, Mr. Nesmith provided contradictory testimony about his interpretation of Judge Henson's alleged comments about buying his silence. In testimony proffered to the Chairman of the

[8] As indicated in the Statement of the Case and Facts, Mr. Nesmith did not make this allegation in his interview with the State Attorney's Office. Likewise, he did not tell the Assistant State Attorney that Judge Henson had told him he would later deny that he had advised Diana to flee the jurisdiction. (T1 at 136-42; Exh. 6).

Hearing Panel, Mr. Nesmith originally stated that the Diana Jimenez case was the only thing to which Judge Henson could have been referring. Mr. Nesmith later changed his testimony and indicated that he could not be sure that Judge Henson was referring to the Diana Jimenez situation when he made the alleged comments.

In response to questions asked by the members of the Hearing Panel, Mr. Nesmith testified for the first time that he believed Judge Henson may have been joking when he allegedly said he was trying to buy Mr. Nesmith's silence. Mr. Nesmith testified that he did not take Judge Henson's alleged comments seriously.

On cross-examination, Nesmith was forced to admit that when he was previously interviewed under oath about these very same events, he had failed to remember (or mention) either Henson's alleged statement that he would deny telling Nesmith about the advice to flee, or the alleged "buy your silence" comment.

Even though the Hearing Panel indicated that it did not consider Judge Henson's alleged comments about buying Mr. Nesmith's silence in reaching its decision, Mr. Nesmith's inconsistent testimony about the subject raises serious concerns about his credibility.

Moreover, if Judge Henson had in fact told Mr. Nesmith that he had told Diana and Dr. Jimenez that Diana should flee the jurisdiction, and later offered to buy Mr. Nesmith's silence about the matter, Mr. Nesmith had an ethical obligation to report Judge

Henson's misconduct to the proper authorities. Rule 4-8.3(a) of the Rules Regulating the Florida Bar provides that "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question at to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority." The fact that Mr. Nesmith never contacted either law enforcement or the Florida Bar about Judge Henson raises serious doubts that Mr. Nesmith's testimony on this subject was credible. Mr. Nesmith was familiar with his obligations under the Rules of Professional Conduct, because he has been the subject of a Florida Bar grievance on a number of occasions, and had been sanctioned with both a 30-day suspension and a public reprimand from the Florida Bar.

Finally, both Mr. Nesmith and Judge Henson provided testimony that there had been some animosity between the two lawyers on multiple occasions. Those disagreements establish that Mr. Nesmith may have had a motive to be less than truthful in his testimony before the Hearing Panel.

Mr. Nesmith's testimony was confused, contradictory, and imprecise. In light of the serious concerns about Mr. Nesmith's credibility, his inconsistent testimony, and his inability to remember the timing and details of alleged conversations which would have been extremely memorable to any reasonable person, this

Court should afford Mr. Nesmith's testimony very little weight.

Dr. Jimenez

Dr. Alberto Jimenez was the unhappy father of an unhappy former client of Judge Henson. At the suggestion of Judge Henson's political opponent, he had previously filed a bar grievance against Judge Henson. He had a fee dispute with Judge Henson. He was unhappy about the manner in which his daughter's criminal case had been handled and with the results of that case. His testimony provides a classic example of bias, prejudice, and interest in a witness.

The testimony of Dr. Jimenez should also be accorded very little weight. Dr. Jimenez testified that, during the telephone conversation in which they were discussing the State's 16-year plea offer, Judge Henson told him that they could send Diana to Puerto Rico and Columbia. However, that testimony is seemingly contradicted by Dr. Jimenez testimony that, during that phone call, he told Judge Henson that there was **no extradition** between the United States and Columbia. Dr. Jimenez further testified that Judge Henson told him during that phone call, and his wife at the August 2001 meeting, that there **was** extradition between the United States and Columbia.

Dr. Jimenez conceded that the aforementioned telephone call was the only time at which there was ever any discussion whatsoever between himself and Judge Henson about Diana fleeing the

jurisdiction. That testimony is consistent with the testimony of Judge Henson. Even if Dr. Jimenez' testimony were believed in its entirety, it is a far cry from proving, by clear and convincing evidence, that Judge Henson advised Diana to flee the jurisdiction, as charged by the JQC.

Since Dr. Jimenez' testimony was contradictory and imprecise, it should not be accepted as credible. Therefore, this Court should conclude that Dr. Jimenez' testimony failed to provide support for the Hearing Panel's conclusion that the JQC had established Judge Henson's guilt on Count Two by clear and convincing evidence.

Maria Jimenez

Maria Jimenez, Diana's mother, who does not speak English, merely testified that she heard the words "Columbia" and "extradition" at the August 2001 meeting in Judge Henson's office. She does not speak fluent English and only understands certain English words. As indicated in Argument II of this Response, Maria's hearsay testimony, even though it proves nothing, should not have been admitted at the hearing in this case, and thus, should not be considered by this Court in making its ultimate determination.

Lack of Preparation for Trial

The Hearing Panel's conclusion that Judge Henson was not prepared for a trial in Diana Jimenez' case not only relates to

uncharged misconduct, but is simply not supported by the record.[9] The Hearing Panel's finding that Judge Henson had not adequately prepared the case through motion practice is contradicted by the record. Judge Henson testified that he did not file any motions in the case because Assistant State Attorney Michael Saunders told him that, if he filed motions, the State would rescind the plea offer it had made in the case. (T3 at 362). That testimony was corroborated by Attorney Saunders and establishes that any decision by Judge Henson to not file motions was strategic in nature, and not the result of any inadequate preparation. (T4 at 511).

Likewise, the Hearing Panel's conclusion that Judge Henson failed to conduct any discovery is belied by the fact that Judge Henson and Michael Saunders actually traveled to North Carolina in order to conduct a deposition in this case. (T3 at 359; T4 at 504, 510). No expert testimony was offered to support this conclusion, nor was any documentary evidence from either the State, the defense, or the court case files offered to support this conclusion.

The Totality of the Evidence Before the Hearing Panel

In its totality, the testimony before the Hearing Panel was consistent with the testimony given by Judge Henson. Judge Henson repeatedly and explicitly denied that he **ever** advised Diana Jimenez

[9] This specific allegation of misconduct on the part of Judge Henson was abandoned by the JQC prior to the hearing in this case. (Order on Pre-Hearing Conference).

or Dr. Jimenez that Diana should flee the jurisdiction in order to avoid prosecution. He acknowledged, however, that he discussed the issue of Diana fleeing the jurisdiction with her father, Dr. Jimenez. Judge Henson testified that he engaged in that discussion only after Dr. Jimenez raised the issue in a telephone call concerning the State's 12-year plea offer. Such a discussion was completely consistent with Judge Henson's ethical obligations. Rule 4-1.2(d) of the Rules Regulating the Florida Bar provides that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

The Hearing Panel's Finding of Guilt on Count Two

The JQC failed to present clear and convincing evidence that Judge Henson advised Diana to flee the jurisdiction in order to avoid prosecution. The testimony of Diana, Dr. Jimenez, and Mr. Nesmith was contradictory, imprecise, confused, and lacked credibility. As in *Davey*, the evidence in this case was "a far cry from the level of proof required to establish a fact by clear and convincing evidence."

Additionally, the Hearing Panel's conclusion that Judge Henson was unprepared for a trial in Diana's case is not supported by the record and should not be considered by this Court. The actual testimony presented to the Hearing Panel, when independently

reviewed and examined in light of its inconsistencies and substantial impeachment, was actually consistent with the testimony of Judge Henson.

Therefore, the sum total of the evidence presented by the JQC was simply insufficient to produce a firm belief, without hesitancy, that Judge Henson is guilty of advising Diana Jimenez to flee the jurisdiction. Accordingly, as it did in *Davey*, this Court should reject the findings and conclusions of the Hearing Panel, and conclude that there was insufficient evidence to support a finding of guilt against Judge Henson on Count Two.

II. THE HEARING PANEL IMPROPERLY CONSIDERED ACQUITTED CONDUCT, UNCHARGED MISCONDUCT, AND INADMISSIBLE HEARSAY, IN REACHING ITS DECISION AND MAKING ITS RECOMMENDATION TO THIS COURT.

The Hearing Panel improperly considered (1) conduct for which Judge Henson had been found not guilty; (2) uncharged misconduct; and (3) inadmissible hearsay testimony in reaching its decision.

Acquitted Conduct

The Hearing Panel found Judge Henson not guilty on the charge of failing to convey the State's 12-year plea offer to Diana Jimenez and not guilty of advising Jerry Lee Thompson and Hector Rodriguez to flee the jurisdiction. Despite that fact, the Panel cited evidence on all three of those charges to support its finding of guilt on Count Two.

Pursuant to JQC Rule 12(a), the Florida Rules of Civil Procedure are applicable to a JQC proceeding **except where**

inappropriate. Although a JQC proceeding is considered civil in nature for certain purpose, it also has strong similarities to a criminal prosecution. Based on those similarities, a judge subject to a JQC proceeding should be afforded many of the same due process rights afforded to a criminal defendant.

It is well-established that a judge subject to JQC proceedings is entitled to both substantive and procedural due process. *In re Graziano*, 696 So. 2d 744 (Fla. 1997); *In re a Judge*, 357 So. 2d 172, 180-81 (Fla. 1978). A judge "may not be removed from office unless his constitutional rights are protected." *In re a Judge*, 357 So. 2d at 181.

In the context of a criminal prosecution, the appellate courts of Florida have consistently held that the consideration of acquitted conduct by a trial judge in imposing sentence violates due process under both the Florida and United States Constitutions. *See e.g. Cook v. State*, 647 So. 2d 1066 (Fla. 3d DCA 1994); *Mendel v. State*, 535 So. 2d 695 (Fla 2d DCA 1988); *Epprecht v. State*, 488 So. 2d 129 (Fla. 3d DCA 1986); *Fletcher v. State*, 457 So. 2d 570 (Fla. 5th DCA 1984) ("Constitutionally a defendant should not be punished (sentenced) for conduct of which he has been acquitted"). There is absolutely no reason why this rule should not be applied to a judge who is facing the ultimate sanction of removal.

Despite the JQC's finding of not guilty on the charge that Judge Henson failed to properly convey the State's 12-year plea

offer to Diana Jimenez, it is readily apparent that the Hearing Panel used evidence on this charge to support both its finding of guilt on Count Two and its recommendation that Judge Henson be removed from office. The Hearing Panel's consideration of that evidence in that regard violated Judge Henson's right to due process under the Florida and United States Constitutions.

Likewise, despite its finding of not guilty on both charges, it is also readily apparent that the Hearing Panel used evidence concerning Judge Henson's alleged misconduct in advising Jerry Lee Thompson[10] and Hector Rodriguez to flee the jurisdiction to support its decision and recommendation. The Panel specifically cited the fact that Bail Bondsman Rojelio Candelaria was involved in the Jimenez, Thompson, and Rodriguez cases to support its finding of guilt on Count Two. The Hearing Panel explicitly noted that it was "troubled by his presence in regard to all three of these matters." The Hearing Panel's consideration of this evidence, related to conduct for which Judge Henson had been found not guilty, was inappropriate and constituted a violation of his right to due process.

[10] In fact, an independent review of the record reveals that the Hearing Panel actually erred in admitting the deposition testimony of Jerry Lee Thompson into evidence. (T1 at 89-; T2 at 221). *See* Argument II, Inadmissible Hearsay.

Uncharged Misconduct

The Hearing Panel made a specific finding that Judge Henson had been untruthful in his testimony before the panel. The Hearing Panel's specific conclusion on this issue was unnecessary and was inappropriate because it was based on misconduct which had not been formally charged.

"[O]nly where lack of candor is formally charged and proven may it be used as a basis for removal or reprimand." "Discipline based on lack of candor may be imposed only where the Commission makes particularized findings on specific points in the record." *In re Davey*, 645 So. 2d at 406; *See also Florida Board of Bar Examiners re G.J.G.*, 709 So. 2d 1377 (Fla. 1998) (attorney could not be subjected to additional punishment for maintaining his innocence during an investigatory hearing).

The Hearing Panel's indication that it did not consider the fact that it believed Judge Henson's testimony to be untruthful in reaching its decision and making its recommendation is contradicted by its specific conclusion on this issue. (JQC Findings at 11-12). The Hearing Panel's subsequent indication that it rejected his testimony and accepted the testimony of Diana Jimenez, Dr. Jimenez, and Mr. Nesmith, would have provided this Court with sufficient reasoning for the Panel's decision. The Hearing Panel's decision to include a specific finding of fact on the truthfulness of Judge Henson's testimony clearly establishes that the Panel improperly

considered this issue as a separate basis to support its decision and recommendation to this Court.

Additionally, as indicated in Argument I, the Hearing Panel also improperly considered evidence on the allegation that Judge Henson had failed to properly prepare for a trial in Diana Jimenez' case. As previously indicated, the JQC had abandoned that charge prior to the commencement of the hearing in this case. Once that charge was abandoned, it was completely inappropriate for the Hearing Panel to consider it as a basis for its decision and recommendation to this Court. *See Davey*, 645 So. 2d at 406-07 (discussing judges' right to notice of charges on which he will need to defend).

Moreover, as indicated in Argument I, the Hearing Panel's conclusion that Judge Henson had failed to adequately prepare the case through motion practice, and had failed to engage in discovery, is totally unsupported by the record. Therefore, there was absolutely no basis for the Hearing Panel to conclude that Judge Henson was not prepared to go to trial in Diana Jimenez' case, or to use that conclusion to support its finding of guilt on Count Two.

Finally, the Chairman of the Hearing Panel erred in allowing the JQC to present any testimony about Judge Henson's alleged statement that he was trying to buy Mr. Nesmith's silence. Judge Henson was never formally charged with this alleged incident of

misconduct, and thus, had absolutely no notice that he would be required to defend against this allegation. *See Davey*, 645 So. 2d at 406-07.

Inadmissible Hearsay

The Chairman of the Hearing Panel improperly permitted the JQC to present the deposition testimony of Maria Jimenez. Judge Henson timely objected to the portion of Maria's testimony where she stated that she heard the words "Columbia" and "extradition" at the August 2001 meeting in Judge Henson's office. Judge Henson argued that the testimony was inadmissible hearsay, but his objection was overruled by the Chairman of the Hearing Panel.

Maria's testimony was hearsay because it related statements of individuals other than the declarant and was offered in evidence to prove the truth of the matter asserted. Fla. Stat. § 90.801. Such hearsay is inadmissible unless it has been made admissible pursuant to some statutory exception. Fla. Stat. § 90.802. Since there was no applicable statutory exception for this testimony, it was improperly admitted at the hearing.

Likewise, the Chairman of the Hearing Panel erred in admitting the deposition testimony of Jerry Lee Thompson. The admission of this hearsay testimony deprived Judge Henson of his right to cross-examine Thompson. *See* JQC Rule 15(a); *In re Graziano*, 696 So. 2d 744 (Fla. 1997) (Due process requires that JQC be in substantial compliance with its procedural rules and that the proceedings

against are essentially fair); *Grabau v. Department of Health*, 816 So. 2d 701, 709 (Fla. 1st DCA 2002) ("One aspect of due process is the privilege of a party to view and cross-examine a witness.").

In order for former testimony to be admissible, the party against whom the testimony is now offered must have had an opportunity **and a similar motive** to develop the testimony by direct, cross, or redirect examination. Fla. Stat. § 90.803(22); *Friedman v. Friedman*, 764 So. 2d 754, 755 (Fla. 2d DCA 2000). "An attorney taking a discovery deposition does not approach the examination of a witness with the same motive as one taking a deposition for the purpose of presenting testimony at trial." *Id*. at 755; *State v. Green*, 667 So. 2d 756, 759 (Fla. 1995).

Moreover, the JQC failed to establish that Thompson was actually "unavailable" or that they had made a good-faith effort to locate Mr. Thompson and procure his live testimony for this hearing. *See Jackson v. State,* 575 So. 2d 181, 187 (Fla. 1991). Accordingly, there was no legal basis for the admission of this testimony.

Both with and without a consideration of the acquitted conduct, uncharged misconduct, and hearsay evidence which was improperly admitted at the hearing in this case, the JQC failed to establish Judge Henson's guilt on Count Two by clear and convincing evidence. Accordingly, this Court should reject both the Hearing Panel's finding of guilt and recommendation that Judge Henson be

removed from office.

III. THE HEARING PANEL FAILED TO CONSIDER THE EVIDENCE OF JUDGE HENSON'S GOOD CHARACTER, REPUTATION FOR TRUTHFULNESS, AND PRESENT FITNESS TO PERFORM HIS JUDICIAL DUTIES.

The Hearing Panel failed to provide any indication that it considered the wealth of evidence presented by Judge Henson concerning his good character, reputation for truthfulness, and fitness for judicial office. Even though the Hearing Panel mentions the evidence presented in Judge Henson's favor on this subject in its conclusions and recommendations, it never distinguishes it or gives any indication that it was rejected. Instead, the Panel simply concludes, without any other explanation, that Judge Henson is unfit to serve and should be removed. Likewise, there is no indication that the Panel considered his good service as both a county court and circuit court judge.

The Hearing Panel's apparent failure to consider this evidence was in error because the main issue that should be considered in determining the appropriate sanction for a judge found guilty of misconduct is his present fitness to hold judicial office. *See* Article V, Section 12(c)(1), FLA CONST.; *In re Kinsey*, 842 So. 2d 77, 92 (Fla. 2003); *In re Davey*, 645 So. 2d at 408.

At the hearing in this case, Judge Henson presented live testimony from two attorneys and a circuit court judge. The attorneys both indicated that Judge Henson is a truthful person. Judge Henson's former law partner, Joseph Peyton Lea, described

Judge Henson “as honest as the day is long,” and testified that he “would trust Judge Henson with his life.”

Circuit Court Judge Jose Rodriguez, Judge Henson’s current administrative judge, testified that Judge Henson has a reputation for being honest. Additionally, Judge Rodriguez testified that Judge Henson currently performs his work effectively and efficiently.

Judge Henson also submitted six letters from various members of the Central Florida community attesting to his good character and honesty. In addition to those letters and the aforementioned testimony, Judge Henson has provided this Court with three additional letters which attest to his good character. (Attached as Appendix A, B, and C).

In making its decision and recommendation to this Court, there is no indication that the Hearing Panel actually considered the substantial evidence relating to Judge Henson’s good character and good service as a county and circuit court judge. This Court, after independently reviewing the record, and when making its final determination, should consider that evidence and conclude that Judge Henson remains fit to perform the duties of his judicial office.

IV. THE JUDICIAL QUALIFICATIONS COMMISSION LACKED SUBJECT-MATTER JURISDICTION OVER THE MISCONDUCT THAT OCCURRED WHILE JUDGE HENSON WAS A COUNTY COURT JUDGE (COUNT ONE).

The JQC lacks subject-matter jurisdiction over the misconduct Judge Henson committed while he served as a County Court Judge for Orange County. The original Notice of Formal Charges brought by the JQC was filed more than one year after the conclusion of Judge Henson's term of service as a county court judge.

Pursuant to Article V, Section 12(a)(1) of the Florida Constitution, the Judicial Qualifications Commission has "jurisdiction over justices and judges regarding allegations that misconduct occurred before or during service as a justice or judge **if a complaint is made no later than one year following service as a justice or judge**." Article V, Section 12(a)(1), FLA. CONST. (emphasis added); *In re Hapner*, 718 So. 2d 785 (Fla. 1998).

The JQC lacked subject-matter jurisdiction over the allegations in Count One of the Amended Notice of Formal Charges, because the misconduct allegedly occurred during Judge Henson's previous term as a county court judge. Pursuant to Art. V, § 12(a)(1), the JQC only had jurisdiction over that alleged misconduct for one year following Judge Henson's service as a county court judge. *See* Art. V, § 12, FLA. CONST., Commentary 1996 Amendment (amendment "provided the disciplinary body with continued jurisdiction over the former judge so long as the complaint is filed within one year after the judge has left the bench"). Since

Judge Henson's term of service as a county court judge ended in January 2001, the original Notice of Formal Charges, filed on January 5, 2004, was filed long after that one-year period.

The fact that Judge Henson commenced service as a circuit judge in January 2003 does not provide the JQC with subject-matter jurisdiction over the allegations contained in Count One. Under the plain and ambiguous language of Art. V, § 12, the JQC's jurisdiction over those allegations expired in January 2002. There is no legal authority in either the Florida Constitution, the JQC Rules, the Florida Rules of Civil Procedure, or Florida case law which would serve to revive the JQC's jurisdiction over the alleged misconduct by a judge after this one year period has expired.

Judge Henson does not contest the fact that the JQC has jurisdiction to address timely-filed allegations of misconduct against him based on his current position as a circuit judge, but argues that the JQC lacks jurisdiction to consider the subject matter of misconduct which he may have committed while he was a county court judge.

V. PUBLIC REPRIMAND IS THE MOST SEVERE SANCTION APPROPRIATE FOR THE MISCONDUCT ACTUALLY COMMITTED BY JUDGE HENSON

In the event this Court concludes that the JQC had jurisdiction to consider the allegations of misconduct in Count One, the most appropriate sanction for the misconduct Judge Henson actually committed is a public reprimand. As previously asserted, the JQC failed to establish Judge Henson's guilt on Count Two

(advising Diana Jimenez to flee the jurisdiction) by clear and convincing evidence. The misconduct alleged in Count One, which Judge Henson has admitted he committed, was an isolated incident which does not establish that he is presently unfit to hold judicial office.

This Court's main focus in determining the appropriate sanction for misconduct committed by a judge is the present fitness of the judge to hold judicial office. *See* Article V, Section 12(c)(1), FLA CONST.; *In re Kinsey*, 842 So. 2d at 92; *In re Davey*, 645 So. 2d at 408.

This Court has imposed the sanction of public reprimand for misconduct that was far more serious than the misconduct admitted by Judge Henson on Count One. In *In re Wilson*, 750 So. 2d 631 (Fla. 1999), the judge witnessed the theft of a video camera from a Denny's restaurant, but failed to report the crime to law enforcement. When subsequently questioned by Denny's employees, the judge denied any knowledge of the crime. Likewise, when initially questioned by law enforcement, the judge also concealed her knowledge of the crime. Only after being confronted with evidence that she was present when the crime occurred did the judge admit her presence and tell police what had happened. This Court approved the JQC's recommendation that the judge receive a public reprimand.

In *In re Fowler*, 602 So. 2d 510 (Fla 1992), the judge

accidentally backed into a parked car as he was leaving home, and left the scene without determining the extent of the damage to the vehicle or identifying the identity of its owner. When police officers arrived at his home and questioned him about the accident, he misled them to believe that another person was actually driving the vehicle when it collided with the parked car. The judge subsequently pled guilty to furnishing false information about an accident to a police officer. The judge was also charged with improper backing, leaving the scene of an accident, and failure to immediately report an accident, and he paid fines on those charges. This Court adopted the JQC's recommendation that the judge receive a public reprimand.

Finally, in *In re Davey*, *supra*, the judge was found guilty of misrepresenting the merits of a case to his former legal partners, concealing negotiations, and attempting to convert the entire fee earned by the firm to himself. Despite the JQC's finding of guilt on this serious charge, this Court rejected the recommendation of removal and imposed the sanction of public reprimand.

Unlike the misconduct involved in *Wilson* and *Fowler*, the misconduct which Judge Henson has admitted did not involve criminal activity or the deception of law enforcement. Judge Henson's conduct in accepting the Jimenez case at the very end of his judicial term of office, although admittedly improper and serious, is simply less serious than that found in *Wilson*, *Fowler*, or *Davey*.

Moreover, this Court has held that a public reprimand is appropriate for an isolated incident of misconduct, *In re Davey*, *supra*; *In re Fowler*, 602 So. 2d 510 (Fla. 1992), where the misconduct had no effect on actual litigants and did not result in prejudice to anyone's rights, *In re Norris*, 581 So. 2d 578 (Fla. 1991), and where the judge has continued to serve as a judge without incident since the date of the misconduct, *In re Kinsey*, *supra*.

Since the JQC has failed to establish Judge Henson's guilt on Count Two by clear and convincing evidence, there is no pattern of misconduct, but merely a single isolated incident of misconduct. Judge Henson's admitted misconduct in accepting Diana Jimenez' case while he was still a county court judge had no actual effect on Diana or the outcome of her case. Finally, both prior to and after his single, admitted instance of misconduct, Judge Henson has served as a county and circuit court judge without incident.

Additionally, the testimony of Judge Rodriguez and the wealth of character evidence relating to Judge Henson's honesty and performance as a judge establishes that he remains fit to serve in judicial office. The Hearing Panel has stated that a public reprimand may be the appropriate sanction for a finding of guilt solely on Count One. Since that is the only allegation of misconduct which has actually been proven by clear and convincing evidence, a public reprimand is the appropriate sanction for Judge

Henson.

CONCLUSION

The JQC has only established that Judge Henson committed the misconduct alleged in Count One. The JQC failed to prove the misconduct contained in Count Two (advising Diana Jimenez to flee the jurisdiction) by clear and convincing evidence.

Judge Henson's admitted misconduct in accepting the Diana Jimenez case while he was still a county court judge was an isolated incident of misconduct which fails to establish that he is presently unfit to hold judicial office. As asserted by the Hearing Panel, the appropriate sanction for this single act of misconduct, which was preceded and followed by years of unblemished service as a county and circuit court judge, is a public reprimand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Response has been provided by U.S. Mail to MARK HULSEY, ESQ. and E. LANNY RUSSELL, ESQ., Special Counsel for the Florida Judicial Qualifications Commission, Smith Hulsey & Busey, 225 Water Street, Suite 1800, Jacksonville, Florida 32202; THOMAS C. MACDONALD, JR., General Counsel, Judicial Qualifications Commission, 1904 Holly Lane, Tampa, FL 33629; and BROOKE KENNERLY, Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303, on this 7th day of March, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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